

Message Text

PAGE 01 STATE 117949

71

ORIGIN PM-04

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FM SECSTATE WASHDC

TO AMEMBASSY CANBERRA PRIORITY

INFO AMEMBASSY WELLINGTON

SECDEF

CNO

CINCPAC

CINCPACFLT MAKALAPA

AMEMBASSY SUVA BY POUCH

C O N F I D E N T I A L STATE 117949

CINCPAC ALSO FOR POLAD

E.O. 11652:GDS

TAGS:MARR, MNUC, AS

SUBJECT: NUCLEAR POWERED WARSHIP (NPW) VISITS TO AUSTRALIA

REF: (A) CANBERRA 1807 (DTG 080645Z MAR 76, (B) CANBERRA

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825 (DTG 030612Z FEB 76)

1. SUMMARY. MESSAGE PROVIDES GUIDANCE TO DEAL WITH GOA

CONFIDENTIAL

PAGE 02 STATE 117949

LEGALQUESTIONS REPORTED BY REFTEL A AND TO SEEK GOA

APPROVAL OF A SPECIFIC NPW VISIT. END SUMMARY.

2. BELOW WE HAVE PROVIDED GUIDANCE FOR RESPONSE TO THE

LATEST GOA QUESTIONS (REFTEL A AND B) CONCERNING DETAILED LEGAL LIABILITY ASPECTS OF NPW VISITS. THRUST OF OUR RESPONSE IS THAT, AS WITH PREVIOUS LEGAL QUESTIONS POSED BY GOA (SEE REFTEL C), U.S. IS NOT PREPARED TO GIVE FURTHER FORMAL ASSURANCES GOING BEYOND THOSE ALREADY GIVEN TO GOA. FOREIGN MINISTER PEACOCK CORRECTLY CHARACTERIZED THE SITUATION WHEN HE STATED IN REFTEL D THAT THE DECISION ON NPW VISITS WAS A POLITICAL AND NOT A LEGAL ONE. THIS OF COURSE IS ESSENTIALLY TRUE FOR VISITS BY WARSHIPS OF ANY KIND. IN THE CASE OF NPWS WE HAVE PROVIDED THE GOA,

THROUGH OUR UNILATERAL ASSURANCES, WITH THE SAME CONCRETE BASIS THAT MANY OTHER COUNTRIES HAVE FOUND ADEQUATE WITHOUT FURTHER ELABORATION TO SUPPORT THEIR POLITICAL DECISION TO PERMIT ENTRY. WE OBVIOUSLY CANNOT PROVIDE UNIQUE ASSURANCES TO AUSTRALIA WITHOUT JEOPARDIZING OUR COMMON ARRANGEMENT WITH THOSE GOVERNMENTS WHICH ACCEPT OUR NPW. FYI AS INDICATED REFTEL C, DOD WILL ISSUE AN UNCLASSIFIED DIRECTIVE TO THE NAVY CONTAINING IMPLEMENTING INSTRUCTIONS WHEN THE EXECUTIVE ORDER FOR PL 93-513 IS SIGNED. HOWEVER, THIS IS STILL SOME TIME AWAY. EVEN THEN IT WILL NOT ANSWER EXPLICITLY THE MANY DETAILED LEGAL QUESTIONS WHICH COULD BE ASKED REGARDING THE MANNER IN WHICH THE U.S. MIGHT ULTIMATELY HANDLE CLAIMS IN THE EXTREMELY UNLIKELY EVENT OF A NUCLEAR REACTOR ACCIDENT. END FYI. WHILE DESIRE ON PART OF GOA ADMINISTRATION TO PIN DOWN LEGAL DETAILS IS UNDERSTANDABLE, IT IS NOT POSSIBLE TO CREATE A COMPREHENSIVE IMPLEMENTING REGIME FOR PL 93-513 WHICH WOULD ANSWER EVERY POSSIBLE LEGAL OR ADMINISTRATIVE ASPECT OF HANDLING POTENTIAL CLAIMS. IN OUR VIEW ALL POTENTIAL CONTINGENCIES CANNOT BE RESOLVED IN ADVANCE OF OUR EVER HAVING TO DEAL WITH SUCH CLAIMS. AN EFFORT TO DEVELOP ALL DETAILS OF HOW CLAIMS MIGHT BE HANDLED SEEMS PARTICULARLY UNNECESSARY AS NO POWER REACTOR NUCLEAR ACCIDENT HAS EVER OCCURRED. FOR CONFIDENTIAL

PAGE 03 STATE 117949

THE U.S. TO ATTEMPT TO ANSWER EVERY POSSIBLE QUESTION COULD, AND LIKELY WOULD, OPEN THE DOOR TO DEBATE ON THIS AND OTHER ISSUES AND RESULT IN OUR PRESENT NPW VISIT APPROACH BEING CHALLENGED BY MANY COUNTRIES WHERE OUR NPW NOW VISIT.

3. WE CANNOT OVEREMPHASIZE TO GOA THE IMPORTANCE WE ATTACH TO MAINTAINING THE STRAIGHTFORWARD UNILATERAL APPROACH WE FOLLOW FOR NPW PORT ENTRY. UNTIL DECEMBER 1974 THAT BASIS CONSISTED SOLELY OF THE ASSURANCES CONTAINED IN THE U.S. STANDARD STATEMENT IN WHICH THE SUBJECT OF LIABILITY AND INDEMNITY WAS DEALT WITH ONLY IN PARA 3. BECAUSE OF CONCERNS EXPRESSED BY SEVERAL COUNTRIES OVER THE QUESTION OF ABSOLUTE LIABILITY PL 93-513 WAS ENACTED. THIS LAW REPRESENTS A UNILATERAL POLICY DECLARATION THAT

THE U.S. WILL APPLY AN ABSOLUTE LIABILITY STANDARD TO CLAIMS ARISING FROM INCIDENTS INVOLVING THE NUCLEAR REACTOR OF A U.S. WARSHIP. IN EFFECT PL 93-513 IS AN ASSURANCE OVER AND ABOVE THOSE CONTAINED IN THE STANDARD STATEMENT, AND ONE THAT IS BACKED BY THE FULL WEIGHT OF THE USG. WE SEEK, AS WE ALWAYS HAVE, NPW PORT ENTRY ON THE BASIS OF THESE ASSURANCES. WE DO NOT NEGOTIATE THESE ASSURANCES AS TO DO SO WOULD SUBJECT OUR NPW PORT ENTRY TO A MELANGE OF ARRANGEMENTS THAT WOULD BE HIGHLY DETRIMENTAL TO ESSENTIAL U.S. FLEET FLEXIBILITY. REQUEST BY

GOA FOR FURTHER EXPLANATIONS AND ASSURANCES REGARDING PL 93-513 ARE CONCEPTUALLY NO DIFFERENT FROM REQUESTS WE HAVE RECEIVED FROM OTHER COUNTRIES TO FURTHER EXPAND ON SPECIFIC ASSURANCES CONTAINED IN THE STANDARD STATEMENT. (REFTEL E IS THE LATEST EXAMPLE OF THIS.) THESE WE HAVE NOT GIVEN SO AS NOT TO UNDERMINE THE WORLD-WIDE ACCEPTANCE OF THE STANDARD STATEMENT AS WRITTEN. THE SAME CONSIDERATION APPLIES TO GIVING ADDITIONAL FORMAL EXPLANATION REGARDING IMPLEMENTATION OF PL 93-513.

4. DEPARTMENT, WITH DEFENSE CONCURRENCE, BELIEVES THERE WILL NEVER BE A BETTER TIME TO FACE THE NPW ISSUE HEAD-ON IN AUSTRALIA AND SEEK A SPECIFIC DECISION FROM THE GOA. WE CONCUR WITH EMBASSY ASSESSMENT IN REFTEL F THAT PRIME MINISTER FRASER HAS ALREADY MADE A POLITICAL DECISION TO CONFIDENTIAL

PAGE 04 STATE 117949

ALLOW U.S. NPW PORT ENTRY. HOWEVER, THE ABSENCE OF A SPECIFIC SHIP VISIT REQUEST ON WHICH A CLEAR DECISION MUST BE RENDERED HAS ALLOWED THE ISSUE TO DRIFT. WHILE WE ARE PREPARED TO GIVE INFORMAL ORAL RESPONSES TO THE LATEST SERIES OF QUESTIONS, WE NEED TO CLEARLY CONVEY THAT WE HAVE ALREADY GIVEN THE GOA ALL THE ASSURANCES WE CAN AND THAT WE NOW DESIRE A DECISION FOR A SPECIFIC VISIT ON THAT BASIS.

5. WE BELIEVE BEST APPROACH IS FOR AMBASSADOR TO MAKE DEMARCHE TO PRIME MINISTER (IF POSSIBLE) OR FOREIGN MINISTER COVERING THE FOLLOWING POINTS:

A. U.S. IS AWARE PRIME MINISTER HAS MADE POLITICAL DECISION THAT AUSTRALIA WILL ACCEPT U.S. NUCLEAR POWERED WARSHIP VISITS. THE U.S. HAS INDICATED ON PREVIOUS OCCASIONS WE HAVE ALREADY BEEN AS FORTHCOMING AS WE CAN BE IN GIVING GOA THE SAME COMPREHENSIVE UNILATERAL ASSURANCES (STANDARD STATEMENT AND PL 93-513) GIVEN TO OTHER COUNTRIES.

B. THE U.S. CANNOT NEGOTIATE ADDITIONAL ASPECTS OF OUR ASSURANCES WITH EACH INDIVIDUAL COUNTRY FOR REASONS STATED IN PARA 2 AND 3 ABOVE.

C. THE BASIS WE PROPOSE FOR NPW PORT ENTRY IS THE SAME WHICH THE USG ACCEPTS FOR FOREIGN ALLIED NPW VISITS TO THE U.S.

D. THE U.S. BELIEVES ITS ASSURANCES PROVIDE A SOUND AND ADEQUATE BASIS FOR ANY COUNTRY, PARTICULARLY A CLOSE DEFENSE ALLY SUCH AS AUSTRALIA WHOSE SECURITY INTERESTS ARE CLOSELY TIED TO THE U.S., TO WELCOME OUR NPW INTO THEIR PORTS .

E. WE ARE PREPARED TO GIVE INFORMAL ORAL RESPONSES TO LATEST GOA QUESTIONS IN THE INTEREST OF SHARING WITH GOA OUR PRESENT THINKING ON CLAIMS MATTER. U.S. DOES NOT INTEND TO FORMALIZE THESE ANSWERS BY EXCHANGE OF NOTES OR IN ANY OTHER WAY IN ORDER THAT OUR STANDARD ASSURANCES GIVEN ALL COUNTRIES REMAIN THE SOLE BASIS FOR PORT ENTRY. CONFIDENTIAL

PAGE 05 STATE 117949

F. HAVING CONVEYED THESE RESPONSES, U.S. WOULD LIKE TO SUBMIT A FORMAL REQUEST FOR GOA APPROVAL FOR A VISIT BY THE NUCLEARPOWERED CRUISER USS TRUXTUN TO AN EAST COAST AUSTRALIAN PORT DURING SEPTEMBER 1976. THIS VISIT WOULD FOLLOW TRUXTUN'S VISIT TO NEW ZEALAND AND THEREBY REPRESENT AN IDEAL OPPORTUNITY TO RESOLVE THIS PROBLEM WITH BOTH COUNTRIES AT ESSENTIALLY THE SAME TIME. VISIT REQUEST HAS ALREADY BEEN GIVEN TO NEW ZEALAND AND, ASSUMING PRIME MINISTER FRASER HAS NO MAJOR OBJECTIONS, WE WOULD PLAN TO SUBMIT FORMAL REQUEST TO GOA THROUGH NORMAL CHANNELS SHORTLY.

G. SHOULD PRIME MINISTER OR FOREIGN MINISTER ASK ABOUT WHICH PORT WE DESIRE TO VISIT YOU MAY POINT OUT THAT WE ARE THINKING OF A PORT SUCH AS MELBOURNE. IF ASKED ABOUT SYDNEY YOU MAY STATE THAT THERE IS NO INTENTION TO REQUEST ACCESS THERE FOR TRUXTUN.

6. UPON NOTIFICATION THAT DEMARCHE HAS BEEN MADE, NAVY WILL SUBMIT FORMAL REQUEST FOR TRUXTUN'S VISIT FOR TRANSMITTAL TO GOA.

7. IN SEPARATE APPROACH TO OFFICIAL LEVEL OF DFA, PREFERABLY PRIOR TO AMBASSADOR'S DEMARCHE, EMBASSY SHOULD DRAW ON FOLLOWING IN MAKING ORAL RESPONSE TO LEGAL QUESTIONS IN ORDER PRESENTED IN REFTEL A:

A. PROBLEM. THE U.S. PUBLIC LAW COULD BE AMENDED OR EVEN REPEALED WITHOUT AUSTRALIAN AGREEMENT.

RESPONSE. THE ENACTMENT OF PL 93-513 WAS INTENDED TO GIVE FULL LEGAL STATURE TO A GUARANTEE OF SETTLEMENT WHICH THE USG HAD ALWAYS INDICATED IT INTENDED TO FOLLOW. WITH

OVER A THIRD OF U.S. MAJOR NAVY COMBATANTS NUCLEAR POWERED
IT IS INCONCEIVABLE THAT THE USG WOULD NOT SETTLE MERI-
TORIOUS CLAIMS INVOLVING OUR WARSHIPS, WITH OR WITHOUT
SPECIFIC PRIOR LEGISLATION. TO QUESTION THE DEPENDABILITY
OF THIS LAW IS TO QUESTION THE VALIDITY AND DEPENDABILITY
OF ANY LEGISLATIVE ACTIONS TAKEN BY THE U.S. INCLUDING
BILATERAL AND INTERNATIONAL AGREEMENTS. BETWEEN THE USG
CONFIDENTIAL

PAGE 06 STATE 117949

AND GOA WE DO NOT BELIEVE THERE IS ANY BASIS FOR DOUBTS

ABOUT THE GOOD FAITH OF EITHER COUNTRY REGARDING SUCH
MATTERS.

B. PROBLEM: THE INTERPRETATION OF PL 93-513, THAT IT
WOULD APPLY ON A "NO FAULT" BASIS WITHOUT ANY NEED FOR
THE CLAIMANTS TO PROVE FAULT ON THE PART OF THE U.S., IS
NOT WRITTEN INTO PL 93-513 AND THEREFORE DOES NOT HAVE THE
STATUS OF A PUBLIC LAW; NOR IS IT RECOGNIZED IN ANY
INTERNATIONAL AGREEMENT.

RESPONSE. THE USG IS NOT RELYING ON ANY INTERNATIONAL
AGREEMENT FOR SETTLEMENT OF ITS CLAIM. IT IS MAKING A
UNILATERAL DECLARATION OF INTENT. PL 93-513 STATES "THAT
IT IS THE POLICY OF THE UNITED STATES THAT IT WILL PAY
CLAIMS OR JUDGMENTS FOR BODILY INJURY, DEATH, OR DAMAGE TO
OR LOSS OF REAL OR PERSONAL PROPERTY PROVEN TO HAVE RE-
SULTED FROM A NUCLEAR INCIDENT INVOLVING THE NUCLEAR
REACTOR OF A UNITED STATES WARSHIP". BY NOT REQUIRING
THAT NEGLIGENCE BE PROVEN, AN ABSOLUTE LIABILITY STANDARD
IS ESTABLISHED. THE LEGISLATIVE HISTORY MAKES CLEAR
THAT THIS IS THE CORRECT INTERPRETATION. THE REPORT BY
THE JOINT COMMITTEE ON ATOMIC ENERGY (JCAE) WHICH
ACCOMPANIES PL 93-513, AFTER REVIEWING OTHER U.S. LAWS
SETTING A STANDARD OF ABSOLUTE LIABILITY FOR NUCLEAR
FACILITIES, STATES "THE INTENT OF THE RESOLUTION IS TO
ENABLE THE U.S. TO GIVE A STRAIGHTFORWARD, UNQUALIFIED
ASSURANCE THAT ANY NUCLEAR DAMAGE CLAIMS INVOLVING THE
REACTOR OF A NUCLEAR POWERED WARSHIP WILL BE HANDLED ON AN
ABSOLUTE LIABILITY BASIS REGARDLESS OF WHETHER A FOREIGN
GOVERNMENT HAS ENACTED LEGISLATION TO THAT EFFECT."
ABSOLUTE LIABILITY IS A STANDARD OF FAULT, NOT A MEASURE
OF DAMAGES. NEGLIGENCE ON THE PART OF AGENTS OF THE USG
WOULD NOT NEED TO BE PROVED. ALL THAT WOULD BE NECESSARY
WOULD BE FOR THE CLAIMANT TO SHOW:

(1) THAT AN INCIDENT INVOLVING THE NUCLEAR REACTOR OF A
U.S. NUCLEAR POWERED WARSHIP OCCURRED, AND;

(2) THAT THE DAMAGES CLAIMED RESULTED FROM THAT INCIDENT.
CONFIDENTIAL

PAGE 07 STATE 117949

THE AMOUNT OF DAMAGES TO BE PAID BY THE USG WOULD BE DETERMINED IN ONE OF TWO WAYS. IF THE DAMAGES WERE ADJUDGED BY AN AUSTRALIAN COURT OR ADMINISTRATIVE AGENCY, THE DAMAGES WOULD BE PRORATED ACCORDING TO THE FORMULA CONTAINED IN ARTICLE 12 OF THE SOFA. IF THE CLAIM WAS FILED WITH AND DETERMINED BY THE USG THE PROVISIONS OF ARTICLE 12 OF THE SOFA WOULD NOT APPLY AND THE AMOUNT ADJUDGED WOULD BE PAID IN FULL BY THE USG.

C. PROBLEM. IN THE EVENT THAT CLAIMS WERE MADE IN AUSTRALIAN COURTS, THOSE COURTS COULD NOT APPLY THE U.S. PUBLIC LAW AND THE U.S. HAS RESERVED ITS RIGHTS TO PLEAD SOVEREIGN IMMUNITY.

RESPONSE. IT IS CORRECT THAT USG HAS NOT CONSENTED TO BE SUED IN AUSTRALIAN COURTS. THE ONLY WAY IN WHICH AUSTRALIAN COURTS MIGHT HANDLE THESE CLAIMS WOULD BE UNDER GOA LEGISLATION TO IMPLEMENT SOFA ARTICLE 12. IN THIS CONTEXT USG HAS NO CONTROL OVER THE CHOICE OF LAW RULES IN AUSTRALIAN COURTS. IF GOA WISHES TO ENSURE THAT AUSTRALIAN COURTS WOULD APPLY THE PRINCIPLE OF ABSOLUTE LIABILITY TO NUCLEAR REACTORS, IT PRESUMABLY COULD SET SUCH A STANDARD BY LEGISLATION. IN ANY EVENT, THE CLAIMANT WOULD ALWAYS HAVE THE OPTION OF FILING THE CLAIM WITH THE USG ADMINISTRATIVELY OR SUING IN A U.S. DISTRICT COURT. USG HAS WAIVED ITS SOVEREIGN IMMUNITY FOR SUITS IN ADMIRALTY AGAINST THE USG IN UNITED STATES FEDERAL COURTS. (46 U.S.C. 781 ET SEG.)

D. PROBLEM: PL 93-513 DOES NOT (AND COULD NOT) EXCLUDE THE POSSIBLE OPERATIONS OF THOSE PROVISIONS IN ARTICLE 12 OF THE STATUS OF FORCES AGREEMENT OF 9 MAY 1963 BETWEEN AUSTRALIA AND THE U.S., WHICH IN THE AUSTRALIAN VIEW SHOULD NOT BE DEEMED TO APPLY EXCEPT IN THE CIRCUMSTANCES MENTIONED IN THE DRAFT EXCHANGE OF NOTES OF APRIL 1975. (WE ASSUME GOA IS TALKING ABOUT PARAGRAPH 1, ARTICLE 12, SOFA.)

RESPONSE. TO THE DEGREE WE CAN WE CONVEYED OUR THOUGHTS ON THIS IN OUR PREVIOUS ORAL RESPONSE, REFTTEL (C). WE WOULD EMPHASIZE, HOWEVER, THAT INTENT OF PL 93-513 WAS TO CONFIDENTIAL

PAGE 08 STATE 117949

CONVEY U.S. WILLINGNESS TO PAY MERITORIOUS CLAIMS RESULTING FROM A REACTOR INCIDENT INVOLVING A U.S. NPW. THIS DOES NOT RULE OUT, AS WE VIEW IT, U.S. CONSIDERATION OF ANY CLAIM, WHETHER PRIVATE OR GOVERNMENT WHETHER OR NOT PRESENTED UNDER THE SOFA. PL 93-513 DOES NOT CONSTRAIN THE U.S. TO SETTLE ONLY PRIVATE CLAIMS AND, IN KEEPING WITH THE SPIRIT AND INTENT OF THAT LAW, THE USG WOULD NOT

REJECT A CLAIM ON THE ASSERTION THAT ARTICLE 12 OF THE
SOFA IS EXCLUSIVE REMEDY.

8. AS TO GOA DESIRE FOR PUBLIC ANNOUNCEMENT, ONE
APPROACH WOULD BE FOR GOA TO CITE STANDARD STATEMENT
ASSURANCES, PL 93-513 (ALONG WITH THE EXPLANATIONS PRO-
VIDED BY THE JCAE REPORT) AND ANZUS COOPERATION IN
EXPLAINING HOW OUR JOINT INTERESTS ARE BEING SERVED IN
PERMITTING NPW PORT ENTRY (THIS COURSE OF ACTION WAS

FOLLOWED IN DEALING PUBLICLY WITH VISITS BY UK NPWS TO
U.S. PORTS.)

9. REQUEST EARLY ADVICE AS TO OUTCOME OF AMBASSADOR'S
MEETING WITH PRIME MINISTER OR FOREIGN MINISTER AND
EMBASSY'S PRESENTATION TO DFA.

ROBINSON

NOTE BY OC/T: POUCHED TO SUVA.

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<< END OF DOCUMENT >>

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